



Department of the Senate

## Senate Scrutiny of Bills Committee

# NEWS

**10 September 2015** (drawing on material in the committee's *Alert Digest Nos. 8 and 9 of 2015* and its *Eighth and Ninth Reports of 2015*)

### Introduction

This newsletter highlights key aspects of the Senate Scrutiny of Bills Committee's work, with a particular focus on information that may be useful when bills are debated and to raise awareness about scrutiny principles (see Senate Standing Order 24).

For more detail and discussion of these matters and comments on additional bills look to the committee's [Alert Digests](#) and [Reports](#). An index to all committee comments is available [here](#).

### Key scrutiny issues

- **Appropriation Bill (No. 4) 2014-2015** ([Ninth Report of 2015](#))
  - ❖ Delegation of legislative power (scrutiny of payments to the States and Territories): The committee had sought advice from the Treasurer about what parliamentary and public scrutiny mechanisms are available in relation to payments made to States and Territories. The Treasurer advised that determinations for the payment of financial assistance under the Federal Financial Relations Act are legislative instruments, but most of these are not subject to disallowance. The committee noted that in 2015-16 the Commonwealth will provide the States with payments totalling \$107.7 billion (24.8% of all Commonwealth expenditure). The committee also noted the terms of section 96 of the Constitution which provides that '...the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*' and that the Parliament has largely delegated this power to the executive. The committee draws the information about payments to the States and Territories in the Budget papers and on the Federal Financial Relations website to the attention of Senators. The committee has also requested that detailed information about the particular purposes for which money is sought to be appropriated for payments to State, Territory and local governments be included in future explanatory memoranda.
- **Asian Infrastructure Investment Bill 2015** ([Ninth Report of 2015](#))
  - ❖ Delegation of legislative power, scope of immunities and privileges: This bill implements Australia's membership of the Asian Infrastructure Investment Bank. The committee sought further advice about (1) the nature of the proposed immunities and privileges and whether these modifications to the normal operation of the law may have an adverse impact on personal rights or liberties, and (2) the use of delegated legislation rather than including these important matters in primary legislation.
  - ❖ The Treasurer replied that the immunities do not breach human rights obligations and that they are 'necessary for the efficient and independent functioning of the [All Bank]'. The committee noted that it is not limited to considering matters in the context of international human rights parameters and has a long-standing practice of seeking to identify whether an approach could result in detriment to any person. In this instance the immunities could possibly prevent actions usually available in Australia such as for breach of contract or defamation. However, in light of the role of the immunities in facilitating the implementation of the bank, the committee draws these matters to the attention of Senators and leaves the matter to the Senate as a whole.
- **Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015** ([Alert Digest No. 9 of 2015](#))

- ❖ Standing to seek judicial review: This bill seeks to restrict the meaning of ‘persons aggrieved’ for the purposes of the Administrative Decisions (Judicial Review) Act. Restrictive standing rules pose particular problems in the area of environmental decision-making and, from a scrutiny perspective, it is therefore a matter of concern that the introduction of more restrictive standing rules may result in the inability of the courts, at least in some cases, to undertake their constitutional role to ensure that Commonwealth decision-makers comply with the law. In addition, it appears that the proposed amendment might redirect rather than eliminate litigation. As the explanatory memorandum does not include any detailed justification for the proposed approach the committee has sought detailed advice from the Minister as to why this limitation on the availability of judicial review is justified.
- **Foreign Acquisitions and Takeovers Fees Legislation Amendment Bill 2015** ([Alert Digest No. 8 of 2015](#))
  - ❖ Various matters about which further information has been requested from the Minister (including delegations of legislative power): There are a number of provisions in this bill that give rise to scrutiny issues about which the committee has sought further advice from the Treasurer. These include the delegation of power to provide for exceptions to the operation of the Act and for specifying ‘significant action’ and the incorporation of material by reference. The committee identified cross-referencing errors and noted that a corrected explanatory memorandum would be useful.
  - ❖ Various matters that are left to the Senate’s consideration: A number of provisions in this bill give rise to scrutiny issues, but in light of the detailed justification provided in the explanatory memorandum the committee left them to the consideration of the Senate. These include the availability of judicial review, offences of strict and absolute liability, the reversal of the onus of proof and the abrogation of the privilege against self-incrimination (but with the inclusion of use and derivative use immunities).

## Other bills about which comment was made or for which advice is being sought from the Minister or proposer

The Senate Scrutiny of Bills Committee has also commented on the bills outlined below. In some cases the committee is seeking advice from the relevant Minister or proposer (responses will be considered and tabled in the committee’s future Reports).

- **Crimes Legislation Amendment (Powers, Offences and Other Measures):**
  - The committee noted Senate amendments relevant to its earlier comments in relation to schedules 5 and 6 of the bill and drew attention to its previous comments ([Alert Digest No. 9 of 2015](#))
  - The committee also thanked the Minister for including additional information in the explanatory memorandum as requested by the committee (relating to the imposition of a legal burden of proof on the defendant and the proposed reintroduction of ‘knowingly concerned’ as an additional form of secondary criminal liability) ([Alert Digest No. 8 of 2015](#))
- **Marriage Legislation Amendment Bill 2015**: The committee noted the significant delegation of legislative power and possible retrospective commencement, but in light of the explanation provided left the matter to the Senate ([Alert Digest No. 9 of 2015](#))
- **Passports Legislation Amendment (Integrity) Bill 2015**: The committee welcomed an amendment that will ensure that merits review will be available for subsection 53(4) decisions ([Alert Digest No. 9 of 2015](#))
- **Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015**: The committee has sought further advice as to the need for retrospective commencement and possible adverse impact on individuals ([Alert Digest No. 9 of 2015](#))

## Other responses received

- **Australian Defence Force Cover Bill 2015** (standing appropriation) ([Eighth Report of 2015](#))
- **Australian Defence Force Superannuation Bill 2015** (delegation of legislative power—Henry VIII clause) ([Eighth Report of 2015](#))

- **Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015** (application of provisions to existing awards) ([Ninth Report of 2015](#))
- **Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015** (retrospective application) ([Ninth Report of 2015](#))

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This document contains a very brief summary of some recent comments made by the Senate Scrutiny of Bills Committee (Chair: Senator Helen Polley and Deputy Chair: Senator John Williams).

For any comments or questions, please contact:

Ms Toni Dawes, Secretary, Senate Scrutiny of Bills Committee T: 02 6277 3050, E: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au).